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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.R. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY DEPARTMENT OF CHILDREN'S SERVICES, Plaintiff and Respondent, v. W.R. et al., Defendants and Appellants.	E046194 (Consolidated with E046391) (Super.Ct.No. J196382-86) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed in part and reversed in part with directions.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant W.R.

Lelah S. Forrey-Baker, under appointment by the Court of Appeal, for Defendant and Appellant C.R.

Ruth E. Stringer, County Counsel, and Danielle E. Wuchenich, Kristina M. Robb, and Jacqueline M. Carey-Wilson, Deputy County Counsel, for Plaintiff and Respondent.

Sharon S. Rollo, under appointment by the Court of Appeal, for Minor D.R.

Jacquelyn E. Gentry, under appointment by the Court of Appeal, for Minor V.R.

Michael D. Randall, under appointment by the Court of Appeal, for Minors S.R., Z.R., and A.R.

I. INTRODUCTION

Appellants W.R. (Father) and C.R. (Mother) are the parents of seven children, the youngest five of whom are the subjects of this appeal. The parents separately appeal from orders terminating their parental rights to their three youngest children, twins Child 1 and Child 2, now ages six, and Child 3, now age five, and placing those children for adoption. Mother also appeals from an order denying her section 388[1] petition seeking to terminate a guardianship for Child 4, now age 11, liberalize Mother's visitation with Child 4, and Child 5, now age 12, and reinstate Mother's services for Child 1, Child 2, Child 3, Child 4, and Child 5. The parents' two oldest children, Child 6, now age 16, and Child 7, now age 18, were dependents of the court but were later returned to Mother's care and are not subjects of either parent's appeal.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

Mother and Father each join the other's arguments. (Cal. Rules of Court, rule 8.200(a)(5).)[2] Mother argues: (1) the juvenile court abused its discretion in refusing to hold a full evidentiary hearing on her section 388 petition; (2) there is insufficient evidence to support the juvenile court's findings that Child 1, Child 2, and Child 3 were adoptable; and (3) the juvenile court erroneously determined that the Indian Child Welfare Act (ICWA) did not apply to the proceedings, because the record shows that the Department of Children's Services (DCS) failed to give adequate notice of the proceedings to all federally-recognized Apache tribes pursuant to ICWA.

Father raises four contentions: (1) appointed counsel for the younger children had a conflict of interest which rendered counsel's representation ineffective, and the juvenile court erroneously failed to (2) order sufficient sibling visitation among the children after Father's services for all seven children were terminated in September 2006, (3) order a "bonding study" for the siblings, and (4) determine that the sibling relationship exception to the adoption preference applied when the court ordered Child 1, Child 2, and Child 3 placed for adoption.

DCS concedes that it gave inadequate notice of the proceedings pursuant to ICWA. We therefore remand the matter to the juvenile court with directions to direct DCS to give adequate notice and, in the event no tribe intervenes, continue all affected orders in force and effect. In all other respects, we find no error and affirm the orders.

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[2] All further references to rules are to the California Rules of Court.

II. BACKGROUND

The parents' seven children came to the attention of DCS in July 2004, after sheriff's deputies responded to a hang-up 911 call from the family home in the rural high desert community of Phelan. A deputy found rotten food and debris strewn throughout the house and inadequate food and clothing available for the children. At the time, the seven children ranged in ages from seven months (Child 3) to 13 years (Child 7). The parents were arrested for felony child endangerment and child neglect. All seven children were placed in foster care.

During the previous 11 years, the family had had 16 substantial referrals to child protective services, including a dependency case in Orange County. In 1998, the oldest four children were removed from their parents after Child 5 ingested a high dosage of Mother's seizure medication and had to be hospitalized. Father had a lengthy criminal history, a history of domestic violence, and problems with alcohol. There were no relatives both willing and capable of caring for the children.

In September 2004, the juvenile court declared all seven children dependents of the court pursuant to a mediation agreement, based on Father's alcohol abuse, history of violence and domestic violence, and Mother's failure to protect Child 4 and Child 5. By March 2005, the four oldest children were returned to the family home pursuant to a family maintenance plan. The plan was to transition Child 1, Child 2, and Child 3 into the home at a later date.

DCS feared that the responsibility of caring for Child 1, Child 2, and Child 3 would overwhelm Mother, who suffered from a seizure disorder. The court also expressed concern that Father had not been consistently attending Alcoholic's Anonymous (AA) meetings. Father did not have an AA sponsor. He also had not completed his child abuse treatment program.

In April 2005, Child 1 and Child 2 were placed in another foster home, their fifth in nine months. They were removed from their four previous foster homes due to their extremely aggressive behaviors and hyperactivity. In May 2005, the twins' behavioral health counselor reported that the twins had significant developmental delays, including delays in physical and gross motor skills, visual perception, walking, and speech, and required "extensive services across multiple agencies" to address their deficits. They were not using spoken language at all, although they were more than 30 months old. Child 3 was later determined to have similar developmental delays.

As of May 2005, three of the four older children were "testing the . . . limits" in the family home. Father was working six days each week, and transportation to services was difficult because the family lived in a rural area and Mother could not drive due to her seizure disorder. The court ordered DSC to pursue the possibility of "wrap around" services for the family and submit a new case plan. DCS wanted Mother to complete family therapy with the four oldest children and believed Mother still needed more domestic violence classes, although she had completed a domestic violence program before the four oldest children were returned home.

By June 2005, DCS had enrolled Father, Mother, and the four oldest children in the Family Intervention and Community Support program, which provided weekly, in-home family counseling services. In August 2005, Child 1, Child 2, and Child 3 began having unsupervised overnight and weekend visits with the family. By September 2005, DCS recommended, and the court ordered, the return of the three youngest children to the family home pursuant to a family maintenance plan. Due to their significant developmental delays, Child 1 and Child 2 were eligible for Inland Regional Center (IRC) services.

As of March 2006, DCS recommended that the dependency cases for all seven children remain open and that family maintenance services be continued for the family. The two oldest children were acting out at school and home. However, Child 1 and Child 2 were doing better in their parents' care. They were no longer considered sufficiently delayed to require IRC services, but they were receiving weekly speech therapy and were on a waiting list for Head Start. The twins and Child 3 appeared to be very attached to their parents and older siblings.

In September 2006, all seven children were again removed from the family home and placed in foster care. Then nine-year-old Child 5 had come to school crying and saying Father had beaten up Child 6. One of the children later reported that Father had recently begun drinking again, Mother was also drinking, and the parents had given alcohol to the children. The children were fearful that Father would beat them. The

speech delays of Child 1, Child 2, and Child 3 appeared to have worsened. The three youngest children "babbled" in words that could not be understood by others.

Section 387 petitions were filed. The court found true allegations that Father had a history of violent behavior and had physically abused Child 6 by striking him with a closed fist. The court also found that Mother failed to protect the children from Father either physically or by calling police. DCS recommended that no further reunification services be provided to either parent, and that section 366.26 hearings be set for all seven children. Father was taken into custody for hitting Child 6, and spent one year in prison. He was released in September 2007.

Father's reunification services for all seven children were terminated in November 2006, pursuant to section 361.5, subdivision (a). Mother's reunification services for the five youngest children were also terminated in November 2006, but also in November 2006 the court allowed Child 6 and Child 7 to be returned home to Mother pursuant to a family maintenance plan. Child 6 and Child 7 were "problematic" children who had a strong desire to live with Mother. Mother was ordered not to permit Father to enter or reside in the home, and not to allow any other adult male to reside in the home without prior approval of DCS. Mother was allowed weekly supervised visits with the other five children. Weekly visits among the siblings were also ordered.

In August 2007, the twins were moved to a new foster home, and Child 3 was placed in another foster home. The twins had developed the problem of smearing feces and were continuing to show significant developmental delays. Child 3 did not smear

feces but suffered similar problems. He had been diagnosed with a behavioral disorder, and speech and other developmental delays. A psychiatrist recommended that Child 1, Child 2, and Child 3 be tested for mild to moderate mental retardation.

After September 2006, Child 4 and Child 5 were each placed in separate foster homes, in part because they had been exhibiting "negative behavior and lack of compassion" with the three younger children while living in the same foster home with them. At the same time, the social worker reduced sibling visits from weekly to monthly. In October 2007, the court ordered sibling visits to take place a minimum of once per month, separate from the monthly visits with each parent.

In November 2006, while Father was in prison, Mother obtained a three-year restraining order against him. Father was released on parole in December 2006, but was arrested for violating his parole on December 27, and incarcerated without bail. Mother had allowed Father to stay in the family home between December 23 and 27, in violation of Father's parole, the restraining order, and DCS orders. Following this incident, the court ordered Mother's visits with the five younger children reduced from weekly to monthly.

By November 2007, Mother had moved into the home of her new boyfriend, J.G., in Orange County, together with Child 6 and Child 7. By this time, Child 5 was acting out and not getting along well with the other children in his new foster home and was not doing well in school. In mid-November, Child 5 was placed in a new foster home. Child

5 was in need of services for behavioral and mental health. In December 2007, Child 5 expressed a desire to be returned home to Mother.

In October 2007, Child 4's permanent plan was changed from foster care to long-term guardianship, and a section 366.26 hearing was set for him. Child 4 was doing well both behaviorally and academically. His foster parents wanted to adopt him, but he preferred guardianship because he did not want to lose contact with Mother. In February 2008, Mother withdrew her contest to Child 4's guardianship in exchange for increased visitation with Child 4 and Child 5 of twice monthly, with authority to increase the duration and frequency of those visits. At the same time, Mother agreed to reduce her visitation with the three youngest children to once every other month.

By November 2007, when the twins were five years old, they were at the educational level of three year olds. They continued to have severe speech delays and were difficult to understand. They had attention deficit hyperactivity disorder (ADHD), expressive language disorder, and borderline intellectual functioning. Child 3, who was nearly four years old in November 2007, also continued to be delayed in motor skills, speech, and coping skills.

In March 2008, the juvenile court terminated Child 4's dependency after ordering him placed in a long-term guardianship. Through his attorney, Child 4 asked the court to increase the frequency of his visits with each parent and his siblings to once per week. The court would not order more than twice monthly visits between Child 4 and each

parent, however, and ordered that his sibling visits continue to be limited to once per month.

Also, in March 2008, DCS recommended placing the twins and Child 3 for adoption. The twins had been living in their foster home and Child 3 had been living in his separate foster home since August 2007. The social worker opined that all three children were adoptable because their foster parents were willing to adopt them, and Child 3 was also adoptable due to his young age. The children's foster parents were aware that the children's significant developmental delays and special needs could become exacerbated as they grew older, would likely persist throughout their lives, and that they could have new special needs in the future. Section 366.26 hearings were scheduled for all three children.

Mother filed a section 388 petition in June 2008 in advance of the section 366.26 hearings for the three youngest children. She requested termination of Child 4's guardianship, increased and overnight visits with Child 4 and Child 5, inclusion of her new boyfriend, J.G., in her visits with the children, and reinstatement of her reunification services for Child 1, Child 2, Child 3, Child 4, and Child 5. The court set a "nonevidentiary" hearing on the petition on the same date of the scheduled section 366.26 hearings for Child 1, Child 2, and Child 3. On August 5, 2008, the court denied Mother's petition, terminated parental rights to Child 1, Child 2, and Child 3, and ordered the three children placed for adoption. These appeals followed.

III. DISCUSSION

A. *Mother's Section 388 Petition Was Properly Denied Without a "Full" Evidentiary Hearing, That is, Without Allowing Mother to Present Additional Direct Testimony or Cross-examine the Social Worker*

Mother claims the juvenile court violated her due process rights in failing to hold a "full" evidentiary hearing on her section 388 petition, that is, in denying her petition based solely on the documentary evidence submitted and the arguments of counsel, and without allowing her to present additional live testimony or cross-examine the social worker. We find no due process violations.

1. Background

Mother filed her section 388 petition on June 30, 2008, on Judicial Council form JV-180. In her petition, she requested that the juvenile court revoke Child 4's legal guardianship, allow her overnight visits with Child 4 and Child 5, allow her live-in boyfriend, J.G., to be present during those visits, and reinstate her reunification services for Child 1, Child 2, Child 3, Child 4, and Child 5 with the goal of returning all five children to her care. In support of her petition, she submitted her own declaration and that of her boyfriend, J.G.

As changed circumstances, Mother submitted evidence that she had completed a 10-week domestic violence program in February 2008. She claimed that the return of her two oldest children, Child 6 and Child 7, to her care, her pending divorce from Father, and her stable living arrangement with her new boyfriend, J.G., all showed that she had

changed the circumstances leading to her children's dependency. Mother also submitted a recent report card for Child 6, showing he was now doing well in school. She claimed that reinstating her services for her five youngest children with the goal of returning them to her care would serve their best interests because the children were all closely bonded to each other and to Mother. Also, including J.G. in overnight visits would serve the children's best interests because he was now "an integral part" of Mother's family.

In his declaration, J.G. confirmed that Mother was living with him in his apartment in Orange County, and opined that Child 6 and Child 7 had shown "a great deal of improvement in their behavior" since they came to live with J.G. and Mother, although he described Child 7 as "selfish, controlling, manipulative, and a habitual liar." He said Child 7 had recently "stolen several hundred dollars" from Mother and Mother's sister, and continued to blame Mother for failing to protect her from Father. In his opinion, Mother and Child 7 would "never have a good relationship." Child 7 had an infant son who was also living with Mother, J.G., and Child 6 in J.G.'s apartment.

According to J.G., Child 6 was "very combative" when he came to live with Mother and J.G. He jumped on the hood of J.G.'s car, causing $1,300 in damages, and also damaged some furniture in the home. His behavior and grades had improved, however. During a recent visit, Child 4 told J.G. and Mother that he was unhappy with his guardians and wanted to return home. J.G. was informed and believed that Child 5 also wanted to live with Mother. According to J.G., the three youngest children were all

very attached to Mother, and Child 3 was very attached to Child 6. J.G. was committed to doing whatever he could to support Mother and reunite her with all of her children.

Based on the contents of the petition and its supporting declarations, the court set a "nonevidentiary" hearing on the petition, to be held concurrently with the section 366.26 hearings for Child 1, Child 2, and Child 3 on July 9, 2008.[3] On July 9, DCS requested additional time to respond to the petition. The court granted the request, continued the hearings, and scheduled a pretrial settlement conference on the petition. DCS responded to the petition in a July 23 interim review report and recommended that it be denied in its entirety. Mother filed a reply to DCS's response, which included a 25-page, item-by-item reply to the social worker's statements in opposition to the petition, as set forth in the interim review report.

A hearing on the petition was held on August 5, 2008, immediately before the section 366.26 hearings for the three youngest children. Mother's counsel told the juvenile court that if it would allow an evidentiary hearing, he would call Mother, J.G., and Child 7 to testify. Counsel explained that Mother's reply to DCS's response to the petition was filed "[t]o sort of protect" Mother in the event the court would not allow an evidentiary hearing. County counsel opposed Mother's request for an evidentiary hearing

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[3] The court set the nonevidentiary hearing by checking box 13a. on page 4 of the petition, form JV-180, indicating it *would* hold a hearing on the petition and listing the date and time of the hearing as July 9, 2008. The court also checked box 13b., and wrote on page 4 of the petition that it "would *not* hold an *evidentiary* hearing"; instead, it would make a decision based on the contents of the petition and any other "papers filed," unless good cause was shown for an evidentiary hearing. (Italics added.)

on the grounds Mother had presented extensive documentary evidence in support of her petition and in reply to DCS's opposition, and additional testimony was therefore unwarranted. County counsel claimed Mother's only showing of changed circumstances was her completion of a 12-week domestic violence program, and her reply to the social worker's opposition presented no additional evidence of changed circumstances.

In response, Mother's counsel argued, "[t]he Court saw from our application" that Mother's circumstances had changed based on her recent, finalized divorce from Father, her having moved in with her new boyfriend, J.G., and the return of Child 6 and Child 7 to her care. Mother's counsel also argued that, if he were the trier of fact, he would want to hear Mother explain how her life had changed and how her changed life warranted reinstating her services and "possibly returning the [five youngest] children [to her care] at some point."

The court denied the petition without comment after hearing the arguments of counsel concerning why an evidentiary hearing was and was not warranted. The court added that it had read and considered all of the papers filed in support of and in opposition to the petition. The court then proceeded to the section 366.26 hearings for Child 1, Child 2, and Child 3.

2. Relevant Law and Analysis

Section 388 allows a parent or other person with an interest in a dependent child to petition the juvenile court "to change, modify, or set aside" any previous court order on grounds of "change of circumstance or new evidence." (§ 388, subd. (a); *In re Aljamie*

D. (2000) 84 Cal.App.4th 424, 431.) The court "shall order that *a hearing* be held" on the petition "[i]f it appears that the best interests of the child may be promoted by the proposed change of order . . . ." (Former § 388 subd. (c), italics added.)[4] The petition is to be "liberally construed in favor of granting a hearing to consider the parent's request. [Citations.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

"The parent need only make a prima facie showing to trigger the right to proceed by way of a *full hearing*." (*In re Marilyn H., supra,* 5 Cal.4th at p. 310, italics added.) A prima facie showing has been analogized to a showing of probable cause. (*In re Aljamie D., supra,* 84 Cal.App.4th at p. 432.) "'There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.]'" (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079 (*C.J.W.*).) Courts have also observed that "'if the petition presents *any evidence* that a hearing would promote the best interests of the child, the court will order the hearing.' [Citation.]" (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912, italics added, fn. omitted.)

The parties do not dispute that Mother made a prima facie showing sufficient to trigger a "full hearing" on her petition. (*In re Marilyn H., supra,* 5 Cal.4th at p. 310.) Instead, the parties' dispute concerns the scope of the required hearing. Mother argues she had a due process right to present testimony from herself, her boyfriend, J.G., and

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[4] Section 388, subdivision (c) was redesignated subdivision (d) effective January 1, 2009. (Stats. 2008, ch. 457, § 2.)

Child 7, and to cross-examine the social worker concerning her statements in opposition to the petition. DCS maintains that Mother did not have a due process right to present live testimony or cross-examine the social worker. We agree with DCS.

It has long been held that juvenile proceedings, including hearings on section 388 petitions, "need not be 'conducted with all the strict formality of a criminal proceeding.' [Citations.]" (*In re Lesly G., supra,* 162 Cal.Ap.4th at p. 914.) "Due process is a flexible concept which depends upon the circumstances and a balancing of various factors. [Citation.]" (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817 (*Jeanette V.*); accord, *Lesly G., supra*, at p. 914; see also *In re Sade C.* (1996) 13 Cal.4th 952, 986-992.) Thus, in dependency proceedings, "due process is not synonymous with full-fledged cross-examination rights[,]" and "[t]he due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court." (*Jeanette V., supra*, at p. 817.) Even in criminal proceedings, "the trial court may properly request an offer of proof if an entire line of cross-examination appears to the court to be irrelevant to the issue before the court." (*Ibid.*, citing *People v. Allen* (1986) 42 Cal.3d 1222, 1270 & fn. 31.)

Nevertheless, parents in dependency proceedings have a due process right to be "heard in a meaningful manner." (*In re Lesly G., supra,* 162 Cal.App.4th at p. 915 & cases cited.) This means that, "in particular circumstances," a parent must be afforded "a 'meaningful opportunity to cross-examine and controvert the contents . . .'" of DCS reports, including hearsay statements contained within those reports. (*Jeanette V., supra,*

68 Cal.App.4th at p. 816; *In re Malinda S.* (1990) 51 Cal.3d 368, 379, 383; accord, *In re Lesley G., supra,* at p. 915.) The right to present evidence is one of procedural, not substantive due process. (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1067, fn. 11.) "The essential characteristic of due process in the statutory dependency scheme is fairness in the procedure employed by the state to adjudicate a parent's rights[,]" and "the juvenile court has the statutory duty and the power to identify the issues relevant to the particular hearing and to make necessary relevancy determinations." (*In re James Q.* (2000) 81 Cal.App.4th 255, 265; *Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 760.) In other words, the right to present evidence is limited to "relevant evidence of significant probative value to the issue before the court." (*Jeanette V., supra*, at p. 817; *In re Carl. R., supra*, 128 Cal.App.4th at p. 1068.) Indeed, the juvenile court has the duty and power to "control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought. . . ." (§ 350, subd. (a)(1).) Rule 5.570(h) governs the conduct of hearings on section 388 petitions. (*In re Lesly G., supra,* 162 Cal.App.4th at p. 913.) The rule also reflects the principle that the right to present evidence is limited to relevant evidence of significant probative value to an issue before the court. (*Jeanette V., supra,* at p. 817.) As pertinent, the rule provides: "(2) The hearing must be conducted as a disposition hearing under rules 5.690 and 5.695 if: [¶] . . . [¶] (B) There is a due process right to confront and cross-examine witnesses. [¶] Otherwise, proof may be by

declaration and other documentary evidence, or by testimony, or both, at the discretion of the court." (Rule 5.570(h)(2).)

In view of the documentary evidence submitted in support of and in opposition to Mother's petition, Mother did not have a due process right to present live testimony or cross-examine the social worker. The issues raised in Mother's petition were exhaustively discussed in declarations and other papers filed in support of and in opposition to the petition, and the juvenile court reasonably determined there was no showing of new or additional "evidence of significant probative value" to be presented through live testimony from Mother, J.G., or Child 7, or through Mother's cross-examination of the social worker. (*Jeanette V., supra*, 68 Cal.App.4th at p. 817.) It follows that Mother was afforded an opportunity "to be heard in a meaningful manner,"based solely on the documentary evidence filed in support of and in opposition to her petition. (*In re James Q., supra*, 81 Cal.App.4th at p. 265.)

Nor did Mother's petition present "a credibility contest" between Mother and the social worker, as Mother argues. (*In re Clifton V.* (2001) 93 Cal.App.4th 1400, 1404-1405 [due process right to confront and cross-examine witnesses lies "where there is a contested hearing with an issue of credibility"]; *In re Matthew P.* (1999) 71 Cal.App.4th 841, 851 [due process right to present additional evidence lies when necessary to afford litigant "an opportunity to be heard"].) Although it is true that, as Mother argues, she and the social worker "[e]ach had a different view of the facts," their differing views of the facts concerned the legal import of the facts, not the facts themselves.

The merits of Mother's petition turned on whether Mother had changed the circumstances leading to her children's dependency and whether granting her additional services and liberalized visitation with the five youngest children, with the goal of returning those children to her care, would serve the best interests of those children. On these questions, there was little dispute concerning the facts. Indeed, the evidence Mother proffered in support of her petition was substantially undisputed: Since her services were terminated, Mother had completed a 12-week domestic violence program, had divorced Father, was living with her new boyfriend, J.G., in Orange County, and her two oldest children, Child 6 and Child 7 had been returned to her care.

Mother's counsel wanted Mother, J.G., and Child 7 to testify for the purpose of showing that Mother's circumstances had changed, that all of the children were bonded to her and to each other, and that granting Mother further services with the goal of returning the five youngest children to her care would serve the best interests of those children. But in view of the documentary evidence before the court at the time of the hearing, the court reasonably determined that live testimony from Mother, J.G., or Child 7 would not have presented "relevant evidence of significant probative value" to the issues before the court. (*Jeanette V., supra,* 68 Cal.App.4th at p. 817.) More specifically, the court reasonably determined that granting Mother's petition would not have served the best interests of the five youngest children, regardless of what Mother, J.G., or Child 7 had to say about the question.

The documentary evidence showed that Child 1, Child 2, and Child 3 had severe behavioral problems and developmental delays, and Child 4 and Child 5 had been placed in separate foster homes because they had been "acting up" and "being aggressive with each other." The evidence also showed that the older children "often victimized" and "physically attacked" the three younger children, the three younger children did not have "an existing close and strong bond" with their older siblings, and had "no concept of the older children being their siblings." In view of this evidence, the court reasonably determined any live testimony from Mother, J.G. or Child 7 would not have assisted the court in assessing the merits of Mother's petition. Aside from whether Mother met her burden of showing changed circumstances, the court reasonably determined that granting Mother additional services and liberalized visitation with the goal of returning the five youngest children to her care would not have been in the best interests of the five youngest children.

Nevertheless, we believe that as a matter of policy, juvenile courts should allow parents, such as Mother, who bring section 388 petitions after their services have been terminated, to present live testimony and cross-examine social workers and others who present opposing documentary evidence, even when the parent has no procedural due process right to present such evidence—provided the presentation of the live testimony and cross-examination does not unduly interfere with the "expeditious and effective ascertainment" of the merits of the petition. (§ 350, subd. (a)(1).) Parents often bring section 388 petitions seeking further services with the ultimate goal of regaining custody

or, at the very least, preserving parental rights after services have been terminated but before a permanent plan has been selected and implemented for the child. (§ 366.26.) Oftentimes, the live testimony or cross-examination the parent wishes to present would consume little court time but would go a long way toward convincing the parent that his or her petition has had a "full hearing" or a "full evidentiary hearing."

Moreover, it has long been recognized that a parent's interest in the companionship, care, custody, and management of his or her children "is a compelling one, ranked among the most basic of civil rights." (*In re Marilyn H., supra,* 5 Cal.4th at p. 306, citing *In re B.G.* (1974) 11 Cal.3d 679, 688.) But after the parent's reunification services have been terminated, the child's interest in permanency and stability "takes priority." (*Marilyn H., supra,* at p. 309.) At this stage of the proceedings, section 388 provides a statutory "escape mechanism," that is, "a means for the court to address a legitimate change of circumstances while protecting the child's need for prompt resolution of his custody status." (*Ibid.*) In view of the vital role section 388 petitions play in preserving parental rights after the parent's services have been terminated, we believe it is wise to afford the parent/petitioner the benefit of the doubt and allow him or her to present live testimony or cross-examine witnesses at the hearing on his or her section 388 petition—even if, strictly speaking, the parent has no procedural due process right to present such evidence.

B. *Substantial Evidence Supports the Juvenile Court's Determination That Child 1, Child 2, and Child 3 Were Adoptable*

Mother claims the juvenile court erroneously determined that the twins and Child 3 were adoptable. We conclude that substantial evidence supports the court's findings that all three children were adoptable.

1. Applicable Law and Standard of Review

A juvenile court may terminate parental rights if it finds by clear and convincing evidence that the child is likely to be adopted. (§ 366.26, subd. (c)(1); *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223.) "'"'Clear and convincing' evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.]"' [Citations.]" (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1205.) On appeal, we will uphold a juvenile court's finding that a child is adoptable if it is supported by substantial evidence. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

The question of adoptability requires the court to focus on the child and whether the child's age, physical condition, and emotional state make it difficult to find a person willing to adopt the child. (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) An adoptive parent's willingness to adopt a child indicates that the child is adoptable, meaning he or she is likely to be adopted within a reasonable time either by the adoptive parent or *"some other family*." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650.) An adoptive parent's willingness to adopt the child is not solely determinative, however, of

whether the child is adoptable. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400.) Instead, it is a factor to be considered, together with the child's age, physical condition, and emotional state.

A distinction has been made between children who are "generally" adoptable and "specifically" adoptable. (E.g., *In re Carl. R. supra,* 128 Cal.App.4th at pp. 1061-1062.) A child is "specifically adoptable" if his adoptability is based "*solely*" on his caretaker's willingness to adopt and "generally adoptable" if his adoptability is based on his age, physical condition, and emotional state. (*In re Sarah M., supra,* 22 Cal.App.4th at p. 1650; see also *In re Jayson T.* (2002) 97 Cal.App.4th 75, 88, disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.)

A specifically adoptable child "is at high risk of becoming a legal orphan" if parental rights are terminated and the adoption falls through. (*In re Carl R., supra,* 128 Cal.App.4th at p. 1062.) For this reason, the juvenile court must be careful not to "avoid confronting the child's *general* adoptability" at the section 366.26 hearing, particularly when the child's current caretakers are willing to adopt the child. (*In re Jayson T., supra,* 97 Cal.App.4th at p. 88; but see § 366.26, subd. (i) [order terminating parental rights may be set aside pursuant to § 388 when, for example, child not adopted within three years of termination and court determines adoption is no longer child's permanent plan].)[5]

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[5] When a child is only specifically adoptable, the juvenile court must determine whether there is a legal impediment to adoption on the part of the prospective adoptive parents. (*In re Sarah M., supra,* 22 Cal.App.4th at p. 1650.) Mother does not argue, however, that there were any legal impediments to adoption on the part of the twins' or Child 3's prospective adoptive parents. Nor does she argue that the juvenile court failed

[footnote continued on next page]

2. Analysis

Mother argues that Child 1, Child 2, and Child 3 were not generally adoptable because each of them had significant developmental delays and special needs which may increase or become exacerbated as the children grow older. In addition, she argues that the children's special needs raise "serious doubts" about their specific adoptability, notwithstanding their respective caretakers' willingness to adopt them. DCS maintains that the court properly determined that the children were adoptable based on their current caretakers' willingness to adopt them, even if they were not generally adoptable. We agree with DCS.

As Mother points out, Child 1 and Child 2 and their younger brother Child 3 each had histories of significant behavioral problems and developmental delays that could increase or become exacerbated as the children grow older. Child 1 and Child 2 had a history of smearing feces and oppositional behavior, which caused them to be placed in multiple foster homes during their first nine months in DCS custody. Child 3 also had a history of significant behavioral problems.[6]

[footnote continued from previous page]
to sufficiently assess the prospective adoptive parents' ability to meet the children's needs. (*In re Carl R., supra,* 128 Cal.App.4th at pp. 1060-1067.)

[6] In June 2008, the juvenile court approved DCS's application to allow Child 3 to receive psychotropic medication for ADHD even though he was only four years old and generally considered too young to receive the medication. The application was based on "emergency circumstances" and described Child 3 as "out of control." He was "destructive," "throwing things," writing on walls and car seats, "screaming," "not listening," and "irritable."

All three children also had significant speech and language delays, ADHD, and asthma. The twins had borderline intellectual functioning and required additional testing for mental retardation. Child 3 was considered to be in the low-average range of intelligence but had the "probable potential" for average intelligence. All three children were receiving speech and language therapy. Due to the severity of all three children's special needs, the twins were placed separately from Child 3.

The social worker opined that the children's special needs "might ordinarily present as an obstacle, or cause a delay, in locating an adoptive home." Nevertheless, the social worker opined that the children were "adoptable" because their current foster parents were willing to adopt them. The foster parents were aware that the children's special needs may become exacerbated as the children grow older, that previously unknown special needs may also emerge, and that at least some of the children's special needs were likely to persist throughout their lives. As noted, the willingness of a child's caretakers to adopt the child generally indicates that the child is likely to be adopted within a reasonable time, either by his current caretakers or another family. (*In re Sarah M, supra,* 22 Cal.App.4th at pp. 1649-1650.)

Here, however, the current caretakers' willingness to adopt the children is not the only evidence that supports the court's adoptability findings. The social worker reported that all three children shared a "reciprocally warm and positive relationship" with their prospective adoptive parents and had gained "stability and confidence" in their care. This indicated that the children were capable of forming positive relationships with parental

figures other than their current caretakers. It is also significant that all three children had been in the care of their prospective adoptive parents for a full year by the time of the section 366.26 hearings.

In any event, even if the children were not generally adoptable, they were properly determined to be adoptable based on their current caretakers' willingness to adopt them and the additional evidence that they had formed warm and positive relationships with their current caretakers.

Mother relies on *In re Jayson T., supra,* 97 Cal.App.4th at pages 81 through 91, for the proposition that an adoptability finding may be reversed when the child suffers from significant behavioral or developmental problems, the finding is based solely on the willingness of the child's caretakers to adopt the child, and there is reason to doubt whether the child's adoptive placement is stable enough to withstand the stresses of the child's ongoing special needs. But Mother does not point to any reason to doubt that the children's current placements are sufficiently stable to withstand the stresses of their ongoing and future special needs.[7]

C. *Reversal and Remand is Necessary to Give Adequate Notice Pursuant to ICWA*

Mother claims that even if this court does not reverse the orders denying her section 388 petition or its adoptability findings for Child 1, Child 2, and Child 3, a

[7] We disagree with Mother that Child 3's need for psychotropic medication and the twins' history of even more severe behavioral problems should have been a "red flag" to the juvenile court that all three children were neither generally nor specifically adoptable. As discussed, the prospective adoptive parents were aware of the children's behavioral problems and were willing to adopt them nevertheless.

limited reversal and remand is necessary because the juvenile court failed to ensure that DCS gave adequate notice of the proceedings pursuant to ICWA. DCS concedes that the notice requirements of ICWA were not satisfied in this case.

At the original detention hearing in July 2004, Father advised the juvenile court he had Apache heritage through his mother. He gave his mother's full name and stated that his maternal grandfather's mother was a full-blooded Apache. DCS gave notice to 10 tribes and received responses from five, but Mother argues, and DCS agrees, that none of the notices contained sufficient extended family information for the tribes or the Bureau of Indian Affairs (BIA) to determine whether any of the affected children were eligible for tribal membership.

As Mother argues, the remedy for this error is to remand the matter to the juvenile court with directions to (1) reverse the orders placing Child 5 in long-term foster care, placing Child 4 in a guardianship, and terminating parental rights and placing Child 1, Child 2, and Child 3 for adoption; (2) direct DCS to give legally sufficient notice to all appropriate Indian tribes; and (3) reinstate the orders in the event no tribe intervenes in the proceedings. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 711.)

D. *Father's Claims Regarding Sibling Visitation Lack Merit*

Father claims the juvenile court violated section 16002, subdivision (b) by failing to "maintain the bonded sibling relationship[s]" between the four older children and Child 1, Child 2, and Child 3, following termination of the parents' services and removal of all seven children from the family home in September 2006. He also claims the court

violated subdivision (e) of section 16002 by failing to order sibling visitation following the placement of Child 1, Child 2, and Child 3 for adoption in August 2008. We reject these claims.

1. Background

Following the removal of the children from the family home in September 2006, DCS placed Child 1, Child 2, Child 3, Child 4, and Child 5 in the same foster home, but by early 2007, Child 4 and Child 5 were in separate foster homes and Child 3 was later placed separately from Child 1 and Child 2. Child 4 and Child 5 were separated from the younger children because they were "acting up" and "being aggressive with each other." In addition, DCS later reported that the older children "often victimized" and "physically attacked" the three younger children. Child 6 and Child 7 were returned to Mother's care in November 2006.

In November 2006, the court ordered weekly visitation among all of the siblings, but after Child 4 and Child 5 were placed in separate foster homes, the older children were visiting the three younger children only once per month. The three younger children continued to visit each other weekly. The court later ordered that sibling visitation would be at least monthly, separate from parental visitation.

As Father points out, in early 2006 and while all seven children were still living in the family home pursuant to a family maintenance plan, DCS reported that the three younger children were "very attached" to their older siblings. But during the spring of 2008, and after the three younger children had been living apart from the older children

for more than a year, DCS reported that the three younger children did not have "an existing close and strong bond" with their older siblings and had "no concept of the older children being their siblings." The three younger children shared a "close and meaningful sibling bond," however.

2. Frequency of Sibling Visitation

Father first complains that the juvenile court violated subdivision (b) of section 16002 in failing to enforce its weekly visitation order after early 2007 and allowing sibling visitation to occur on a monthly basis. He claims the deterioration of the previous sibling bond between the three younger children and their four older siblings is attributable to the juvenile court's failure to enforce its original, November 2006 weekly visitation order for all of the siblings.

Section 16002, subdivision (b) requires the responsible local agency to make a diligent effort to develop and maintain sibling relationships in all out-of-home placements of dependent children. And when placement of the children in the same foster home is not possible, the statute requires that a diligent effort be made and a case plan prepared, "to provide for ongoing and frequent interaction among siblings . . . ." (§ 16002, subd. (b); *In re Clifton B.* (2002) 81 Cal.App.4th 415, 425.)

Father did not object to the frequency of sibling visitation in the juvenile court. He has therefore forfeited any right to complain about the matter on this appeal. When a parent believes a sibling visitation order is inadequate, he must complain in a timely fashion so the juvenile court may address the matter (see *In re Christina L.* (1992) 3

Cal.App.4th 404, 416) and his failure to do so results in a forfeiture of any claim on appeal that the court failed to comply with section 16002 (*In re Anthony P.* (1995) 39 Cal.App.4th 635, 641).

In any event, the claim lacks merit. Father has not demonstrated that the juvenile court or DCS violated section 16002 in allowing monthly rather than weekly visitation between the older and younger children. The statute requires DCS to provide for "ongoing and frequent" interaction among siblings (§ 16002, subd. (b)), and here, there is no showing that monthly rather than weekly sibling visitation was not appropriate under the circumstances. Indeed, the record indicates that the reduced visitation was warranted due to the younger children's significant special needs and the older children's tendency to "victimize" and "physically attack" the younger children.

3. Failure to Order Post-termination Visitation

Father also claims the juvenile court violated subdivision (e) of section 16002 in failing to order sibling visitation between the four older and three younger children after the court terminated parental rights to Child 1, Child 2, and Child 3 and placed them for adoption. Father has also forfeited this claim because he failed to object to the court's failure to order continued sibling visitation when the court terminated parental rights at the section 366.26 hearings for the three younger children. (*In re Anthony P.*, *supra*, 39 Cal.App.4th at pp. 640-641; see also *In re Dakota S.* (2000) 85 Cal.App.4th 494, 502 [recognizing that "waiver doctrine" has been applied in wide variety of contexts in dependency proceedings].)

In any event, this claim also lacks merit. Section 16002, subdivision (e) requires DCS to take certain steps to "facilitate ongoing sibling contact" following the termination of parental rights[8] and implicitly requires the juvenile court to "consider" sibling visitation at the time parental rights are terminated. (*In re Clifton B., supra,* 81 Cal.App.4th at p. 427.) Still, the statute does not require the juvenile court to *order* continued sibling visitation at the time it terminates parental rights, as Father argues.

E. *Father Has Not Demonstrated That Minors' Counsel Had a Conflict of Interest*

Between September 2006 and November 2007, Child 1, Child 2, Child 3, and Child 5 were represented by the same counsel, Ms. Bercham. At that time Ms. Bercham asked to be relieved as counsel for all four children because DCS was recommending different permanent plans for the children. Child 5 was to be placed in a permanent living arrangement and the three younger children were to be placed for adoption. The court relieved Ms. Bercham and appointed Mr. Lai to represent Child 5 and appointed Ms. Ledford to represent the three younger children.

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[8] Subdivision (e) of section 16002 provides: "If parental rights are terminated and the court orders a dependent child to be placed for adoption, the licensed county adoption agency or the State Department of Social Services shall take all of the following steps to facilitate ongoing sibling contact, except in those cases provided in subdivision (b) where the court determines by a preponderance of the evidence that sibling interaction is detrimental to the child: [¶] (1) Include in training provided to prospective adoptive parents information about the importance of sibling relationships to the adopted child and counseling on methods for maintaining sibling relationships. [¶] (2) Provide prospective adoptive parents with information about siblings of the child, except the address where the siblings of the children reside. However, this address may be disclosed by court order for good cause shown. [¶] (3) Encourage prospective adoptive parents to make a plan for facilitating postadoptive contact between the child who is the subject of a petition for adoption and any siblings of this child."

Father claims Ms. Bercham had a conflict of interest and was therefore ineffective in representing all four children, because prior to being relieved in November 2007 she did not seek to enforce the court's November 2006 order for weekly visitation among all the siblings. This argument assumes that weekly rather than monthly visitation was in the interest of Child 5 but not in the interest of the three younger children, or vice versa. But Father fails to articulate the basis of either theory. (Cf. *In re Clifton B., supra*, 81 Cal.App.4th at pp. 427-428, fn. 6 [posttermination contact between two children would likely have been greater had the children been appointed separate counsel].) In any event, Father has not demonstrated a reasonable probability that the outcome of the proceedings would have been different had the older children had weekly rather than monthly visitation with the younger children after all seven children were removed from the family home in September 2006. (*In re Celine R.* (2003) 31 Cal.4th 45, 60.)

Father also claims Ms. Ledford had a conflict of interest in representing Child 1, Child 2, and Child 3, simply because the twins were placed in a different adoptive home than Child 3. He also claims the juvenile court should have recognized this conflict and appointed separate counsel for Child 3. Father fails to articulate how the interests of Child 3 were different than those of the twins, however. Indeed, Ms. Ledford did not have a conflict of interest in representing the three younger children. Nor did she seek a course of action for Child 3 with adverse consequences to the twins, or vice versa. (*In re Barbara R.* (2006) 137 Cal.App.4th 941, 953 [actual conflict arises when minor's counsel seeks a course of action for one child with adverse consequences to the other].)

F. *The Juvenile Court Did Not Err in Failing to Order a Sibling Bonding Study and Reasonably Determined That the Sibling Relationship Exception Did Not Apply to the Adoptions of Child 1, Child 2, or Child 3*

Father claims the juvenile court erred in failing to order a bonding study between all of the children before ordering Child 1, Child 2, and Child 3 placed for adoption. He also claims the court erroneously determined that the sibling relationship to the adoption preference did not apply to any of the younger boys.

In support of his argument regarding the sibling bonding study, Father relies on *In re Jacob S.* (2002) 104 Cal.App.4th 1011, 1015. There, Division Three of this court said: "In a case where the strength of a bond between very young siblings is difficult to determine because of the young age of the children involved, court-ordered sibling bond studies may be appropriate. Such studies would be helpful—in some cases might even be indispensible—in determining whether the sibling relationship exception to the adoption preference applies."

Notably, the court in *In re Jacob S.* expressly did not decide whether a sibling bonding study in that case was appropriate or indispensible. Instead, it concluded that the juvenile court reasonably determined that the sibling relationship exception did not apply because the benefits to the children being adopted outweighed any benefits the children would have realized in maintaining their sibling relationships. (*In re Jacob S., supra*, 104 Cal.App.4th at p. 1018.)

Here, too, the juvenile court reasonably determined that the sibling relationship exception (§ 366.26, subd. (c)(1)(B)(v)) did not apply to the adoptions of Child 1, Child 2, or Child 3 based on the record before the juvenile court. The record is clear that the benefits to all three children of being adopted outweighed any benefit any of them would have realized in maintaining any of their sibling relationships. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951-952 [in determining whether sibling relationship applies, juvenile court weighs benefits to child of adoption against benefits of continuing sibling relationships].)

The three children were not raised in the same home, either with each other or their older siblings. When all seven children were again removed from the family home in September 2006, the twins were nearly four years old and Child 3 was nearly three years old. By the spring of 2008, the boys had "no concept" that the older children were their siblings. As DCS also reported, the younger boys had "scant common experiences" with their older siblings, and the experiences they did have "appear[ed] to be overwhelming[ly] negative with deprivation and exposure to physical, mental, and emotional violence creating a profound lack of an existing beneficial close and strong sibling bond." And, although the twins and Child 3 were closely bonded to each other, "the severity of their individual special needs necessitated" placing them in different homes. Thus, the juvenile court reasonably concluded that the sibling relationship exception did not apply to the adoptions of the twins or Child 3.

IV. DISPOSITION

The orders denying Mother's section 388 petition and denying her request for a full evidentiary hearing on her petition are affirmed. The orders placing Child 5 in long-term foster care, placing Child 4 in a guardianship, and terminating parental rights and placing Child 1, Child 2, and Child 3 for adoption are reversed. The matter is remanded to the juvenile court with directions to order DCS to comply with the notice provisions of ICWA regarding Child 1, Child 2, Child 3, Child 4, and Child 5. The juvenile court is directed to reinstate the reversed orders in the event no tribe intervenes in the proceedings.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ Gaut
Acting P.J.

/s/ Miller
J.